No. 15-274

IN THE

Supreme Court of the United States

WHOLE WOMAN'S HEALTH, *et al.*,

Petitioners,

v.

KIRK COLE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF HISTORIANS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are historians of the United States, whose research focuses on the lives of women. This brief, based on decades of study and research by *amici*, aims to provide accurate historical perspective on laws claiming to protect women. From their vantage point as historians, *amici* wish to point out the constraints on women's liberty and equality in laws that purport to protect women, by sketching the long history of such laws and showing that intentions to protect had the effect of restricting women's choices and undermining their dignity as full citizens.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Texas law at issue in this case purports to protect women's health. The Fifth Circuit stated that "[t]he Texas Legislature's stated purpose for enacting these provisions was to raise the standard and quality of care for women seeking abortions and to protect the health and welfare of women seeking abortions." Pet. App. 25a.

The Texas law follows a long line of prior state laws instituted ostensibly to protect the health, safety, and/or interests of women. Such sex-based laws claiming to protect women have ancient roots in the common law doctrine of coverture, which subsumed a wife's legal

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1. The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

persona under that of her husband, ostensibly for her protection and benefit. Subsequently, state legislatures passed sex-specific regulations said to protect women's health and safety, ranging from exemptions from jury service to restrictions on women's conditions of waged work.

This Court has acknowledged that such past woman-specific laws were "rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973). Because these laws were typically based on gender stereotypes and had the effect of limiting women's liberty and autonomy and treating women as inferior citizens, they have been struck down as unconstitutional sex discrimination.[2]

Thus, any new law that claims to protect women's health and safety should be scrutinized carefully to assess whether its ostensibly protective function actually serves to deny liberty and equal citizenship to women. This is especially necessary when the law affects a woman's ability to choose to terminate a pregnancy, one of "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy," which this Court has defined as "central to

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2. For another reference to "romantic paternalism," see *Weeks v. S. Bell*, 408 F.2d 228 (5th Cir. 1969). For disparate treatment as unconstitutional sex discrimination, see *Duren v. Missouri*, 439 U.S. 357 (1979); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Reed v. Reed*, 404 U.S. 71 (1971). For a discussion of *Reed*, see Linda K. Kerber, *Sally Reed Demands Equal Treatment*, *in* DAYS OF DESTINY: CROSSROADS IN AMERICAN HISTORY 440, 441-51 (Alan Brinkley & James M. McPherson eds., 2001).

the liberty protected by the Fourteenth Amendment." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

ARGUMENT

I. THE DOCTRINE OF COVERTURE PURPORTED TO PROTECT WOMEN, WHILE SEVERELY LIMITING THEIR ECONOMIC AND POLITICAL RIGHTS.

Wives' subordinate status under the Anglo-American common law doctrine of coverture was justified as protecting their safety and their interests. This legal regime, which antedated the American Revolution and influenced state laws long after it, authorized husbands to control their wives' bodies, labor, property, and political status, since women were presumed to be the weaker sex and inferior in reason and judgment. Ostensibly for their own protection, wives had no independent legal or economic identity; they were "covered" and represented by their husbands.[3]

The classic (and authoritative) formulation was William Blackstone's in his COMMENTARIES ON THE LAWS OF ENGLAND published in 1765, and widely cited thereafter among lawyers in America: "By marriage, the husband

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3. On the impact of coverture, see generally LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP, at ch. 1 (1998) [hereinafter NO CONSTITUTIONAL RIGHT]; SANDRA F. VANBURKLEO, BELONGING TO THE WORLD: WOMEN'S RIGHTS AND AMERICAN CONSTITUTIONAL CULTURE 1-57 (2001); Linda K. Kerber, *Why Diamonds Really Are a Girl's Best Friend: Another American Narrative*, DAEDALUS, Winter 2012, at 89, 89-100.

and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs every thing. . . . [H]er condition during her marriage is called her *coverture*." After reviewing the married woman's legal infirmities, Blackstone concluded "that even the disabilities, which the wife lies under, are for the most part intended for her protection and benefit." 1 WILLIAM BLACKSTONE, COMMENTARIES *430, *433 (emphasis in original).

The husband's control and the wife's subordination to his governance were justified as in her best interests and for her protection. Yet this protection meant that wives were barred from making choices for themselves. Early American states drew heavily from the common law doctrine of coverture, effectively denying full citizenship to married women. *See* NANCY F. COTT, THE BONDS OF WOMANHOOD: WOMAN'S SPHERE IN NEW ENGLAND, 1780-1835, at 20-22, 76-80 (1977); *see also* NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 10-13, 52-55 (2000). In community property states such as Texas, the legacy of Spanish civil law allowed wives to be acknowledged as owners of their separate property and half-sharers in marital property. Nonetheless, husbands had complete and sole control of all marital property. Only if the husband died was the wife allowed to manage the property, and then only as long as she did not remarry. 1879 Tex. Rev. Civ. Stat. 2181, *available at* http://www.sll.texas.gov/library-resources/collections/historical-texas-statutes/. A wife in Texas (as in other states) had no capacity to transact business for herself and thus she could not serve as a trustee, executor, or legal guardian

for another. She could not enter into any contracts herself, as they were absolutely void at law; neither could she sue nor be sued without her husband joining her. Her earnings were community property and as such under her husband's control, well into the 20th century. *See, e.g.*, 1925 Tex. Rev. Civ. Stat. 4626, *available at* http://www.sll.texas.gov/library-resources/collections/historical-texas-statutes/.

The protective rationale underlying statutes and court rulings in Texas and throughout the United States sustained the husband's authority over his wife and thus deprived her of most of the important choices in family life.[4] The husband's legal authority over the children, and sole authority to decide the location of the family's domicile, persisted well into the 20th century.[5] As the wife's legal protector in Texas as in all other states, the husband was expected to defend his wife from other men's violence. However, his right of access to her body prevented him from being convicted of raping her until

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4. Elizabeth York Enstam, *Women and the Law*, TEX. ST. HIST. ASS'N, https://www.tshaonline.org/handbook/online/articles/jsw02 (last visited Dec. 28, 2015); on the husband's authority over the family, and the constraints on wives, see generally MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 25-30 (1985); HENDRIK A. HARTOG, MAN AND WIFE IN AMERICA: A HISTORY 93-167 (2000); BARBARA YOUNG WELKE, LAW AND THE BORDERS OF BELONGING IN THE LONG NINETEENTH CENTURY UNITED STATES 64-70 (2010).

5. *See* HARTOG, *supra* note 4, at 306-08. The Texas Equal Rights Amendment of 1972 was taken to imply that each spouse could retain his or her separate domicile. 39 Tex. Jur. 3d *Fam. Law* § 391 (2015). In 1963 and 1965, the provisions of 1925 Tex. Rev. Civ. Stat. 4613-4627 ("Rights of Married Women") were amended, and the "disabilities of coverture" abolished.

women's challenges to the marital rape exemption beginning in the 1970s resulted in changes in the laws.[6] Marital rape became a crime in all fifty states by 1993.[7]

This ostensible protection extended to deprivation of political rights. *See* Nancy F. Cott, *Marriage and Women's Citizenship in the United States, 1830-1934*, 103 Am. Hist. Rev. 1440, 1440-74 (1998). Because a married woman lacked a civil identity distinct from her husband's, she was barred from voting, holding office, or serving on juries. The expectation that women would become wives was strong and pervasive enough that married women's political "disabilities" extended to the whole female sex: no woman, whether unmarried or married, had political rights. These restrictions, too, were justified as protective. Wives, daughters, maiden aunts, widows—all women were said to be represented in public life through male heads of households, and thus shielded from the stresses of public life and the burdens of political competition and civic obligation for which they were imagined to be ill-suited.

The "protections" of coverture exposed women to many grave harms in addition to the obvious lack of the right to vote: women property holders were taxed without representation; women were barred from many employments and professions; a woman defendant did not

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6. *See* Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 Cal. L. Rev. 1373, 1482-1505 (2000).

7. The husband's property right in his wife's body and services was reinforced through the rule that allowed him to recover for loss of consortium but denied her a parallel remedy. A wife had no such reciprocal right in Texas until 1978. *Whittlesey v. Miller*, 572 S.W.2d 665, 668-69 (Tex. 1978).

face a jury of her peers. Stereotypes that permeated the logic of coverture easily leaked out of the law of domestic relations into a wide range of regulations. The language of protecting women from the perils of public life sustained exclusions on women's entry into the practice of law, for example. In affirming Illinois' refusal in 1872 to admit a woman to the bar, three members of this Court invoked the common law principle that "a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state," and declared that "[m]an is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life." *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring, joined by Swayne & Field, JJ.).

These constraints were erased only slowly, erratically, and with wide variability from state to state. Resistance to change was generally defended by the assertion that women's interests were protected by their husbands' ballots and that it would be burdensome to women to add public duties to their primary domestic responsibilities.[8] Even after women had won the right to vote, many states continued to constrain their access to full political rights, generally using similar logic. In a solid majority of states, the Nineteenth Amendment was so narrowly interpreted that women were barred from serving on juries by exemptions that were most often justified as protecting

8. *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 191-93, 208-10 (2000); Reva Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 977-87 (2002).

women's particular delicacy of morals. In 1937, New York women were offered a blanket option to choose exclusion from jury service if called, in part on the grounds that women should be protected from being sequestered in a room with men, or being subject to hearing "sordid evidence." When Florida women in 1949 finally were authorized to serve on juries, they had to first register their individual willingness at the county courthouse, so that any reluctant woman would be protected from "the embarrassment of hearing filthy evidence." Massachusetts likewise permitted women to serve on juries that same year with the proviso that no woman would be required to serve if the presiding judge had reason to believe that she would "likely be embarrassed by hearing the testimony or by discussing [it] in the jury room." KERBER, NO CONSTITUTIONAL RIGHT, *supra* note 3, at 136-47 & ch. 4; *see also* VANBURKLEO, *supra* note 3, at 185-207; *see generally* SANDRA F. VANBURKLEO, GENDER REMADE: CITIZENSHIP, SUFFRAGE, AND PUBLIC POWER IN THE NEW NORTHWEST, 1879-1912, at ch. 4-7 (2015). No woman served on a jury in Texas until 1955.

In 1961, this Court, citing women's "special responsibilities," upheld Florida's requirement that women, but not men, register their willingness to have their names added to the pool from which jurors were to be selected. This "relief" for women from having their names automatically placed into the jury pool, as men's were, was envisioned as protective. Justice John Marshall Harlan II explained that "woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service

is consistent with her own special responsibilities." *Hoyt v. Florida*, 368 U.S. 57, 62 (1961).

For much of American history, such laws stood supported by cultural beliefs about women's nature and abilities and their corresponding need for protection.[9] The laws in turn preserved and institutionalized the same stereotypes. Until well into the 20th century, it remained the conventional wisdom of legislatures and courts that women are too weak to act autonomously; that they need protection from the perils of public life; that women's need for protection justifies limitations on their liberty. "These views, of course, are no longer consistent with our understanding of the family, the individual, or the Constitution." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 897 (1992). In *Casey*, this Court recognized the husband's "troubling degree of authority over his wife" embedded in the coverture regime and rejected that understanding of the marital relationship as "repugnant to our present understanding of marriage" because of its affront to the wife's dignity. *Casey*, 505 U.S. at 898; *see* KERBER, NO CONSTITUTIONAL RIGHT, *supra* note 3, at 307.

Since the 1970s, courts and legislatures, pressed by women's rights claimants, have recognized that laws reflecting gender stereotypes are harmful to both women and society. Decisions of this Court have interrupted and broken the self-perpetuating cycle in which laws

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9. The same cultural beliefs often did not apply to African American women. *See* Sharon Harley, *The Solidarity of Humanity: Anna Julia Cooper's Personal Encounters and Thinking about the Intersectionality of Race, Gender, and Oppression*, WOMEN & SOC. MOVEMENTS, March 2015 (Thomas Dublin & Kathryn Kish Sklar eds.).

calling for protections of women affirmed discriminatory stereotypes and deprived women of dignity equal to men's. *See, e.g., Weinberger v. Wiesenfeld*, 420 U.S. 636, 642-45 (1975) (discussing "overbroad generalizations"—*i.e.*, stereotypes). Laws once viewed as protective of women can now be understood as discriminatory. It is no longer reasonable to hold that women lack fully equal legal status, or the competence to make responsible choices.

II. TWENTIETH-CENTURY SEX-BASED LABOR LAWS CLAIMED TO PROTECT WOMEN, WHILE CONSTRAINING THEIR ACCESS TO EQUAL EMPLOYMENT.

Once women entered industrial employment in large numbers, state legislatures began to pass laws ostensibly to protect them at work. The first laws, in the late 19th century, limited women's hours of work. *See, e.g.*, 1893 Ill. Laws 99 (limiting women's work hours to eight per day and forty-eight per week); 1874 Mass. Acts 145 (limiting women's work hours to ten per day and sixty per week); 1897 Pa. Laws 30 (limiting women's work hours to twelve per day and sixty per week); *see generally* NANCY WOLOCH, MULLER V. OREGON: A BRIEF HISTORY WITH DOCUMENTS (1996). These protections for women workers emerged in a legal environment in which this Court upheld "liberty of contract" between employer and employee and struck down laws regulating men's hours, unless their conditions of overwork endangered the public. The courts held that male workers' freedom to negotiate their conditions of work must not be constrained, but they at first differed as to protections for women. *Lochner v. New York*, 198 U.S. 45 (1905); *but cf. Holden v. Hardy*, 169 U.S. 366 (1898) (upholding limits on hours of male miners, whose good

health was part of the public welfare). In 1895, an Illinois court held that "woman is entitled to the same rights, under the constitution, to make contracts with reference to her labor as are secured thereby to men." *Ritchie v. People*, 155 Ill. 98 (1895) (invalidating an eight-hour law for women workers on the ground that women could not be denied liberty of contract); WOLOCH, *supra*, at 16-17. But, following the custom of the day, most state legislators and state courts assumed that: "It is undisputed that some employments may be admissible for males and yet improper for females . . " *Commonwealth v. Beatty*, 15 Pa. Super. 5, 18 (1900); ELIZABETH FAULKNER BAKER, PROTECTIVE LABOR LEGISLATION: WITH SPECIAL REFERENCE TO THE WOMEN IN THE STATE OF NEW YORK 201, 425-26 (1925).

This Court accepted broad legal limitations on women's employment when persuaded by lawyer Louis Brandeis that women's wage work, unless regulated by the state, unavoidably threatened the public welfare.[10] To defend Oregon's law regulating the hours of female (but not male) factory and laundry workers, Brandeis detailed what he called "facts of common knowledge" and offered formidable statistical data to demonstrate that women's ill health, fatigue and exposure to unsafe and unsanitary conditions deleteriously affected their capacity to produce and sustain healthy offspring. This Court in *Muller v. Oregon* unanimously sustained the law on the grounds that women's health was more precarious

10. *Muller v. Oregon*, 208 U.S. 412 (1908); Alice Kessler-Harris, *Affirming the Sexual Division of Labor*, *in* DAYS OF DESTINY, *supra* note 2, at 204, 204-19; *see* NANCY WOLOCH, A CLASS BY HERSELF: PROTECTIVE LAWS FOR WOMEN WORKERS, 1890s-1990s, at ch. 3 (2015).

than that of men; that women had household as well as wage-earning duties; and that the nation had a stake in women's well-being because of women's roles as present or future mothers. Thereafter, women were assumed to be defenseless creatures, easily exploited by employers, and therefore subject to state protection.[11]

By 1917, all but nine states had enacted some legislation restricting female labor, while laws regulating male labor remained unconstitutional. The laws fell into two categories: some explicitly excluded women from engaging in certain kinds of jobs; others restricted women from working during night hours, limited the number of hours in a day or week a woman might work, and regulated the conditions of the workplace. KESSLER-HARRIS, OUT TO WORK, *supra* note 11, at 188-89; WOLOCH, *supra* note 10, at 87-109 & ch. 4. Since industrial workers at the time frequently labored under harmful conditions and for overlong hours, these protections were not inherently detrimental, but rather were harmful primarily because they were sex-specific. Labor laws limiting working hours and making conditions safer would not have disadvantaged wage-earning women if they had covered men too.

While couched in arguments for women's health, morals, and physical safety, the stated purposes of sex-

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11. JUDITH A. BAER, THE CHAINS OF PROTECTION: THE JUDICIAL RESPONSE TO WOMEN'S LABOR LEGISLATION, at ch. 1 (1978); ALICE KESSLER-HARRIS, OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES 180-88 (1982) [hereinafter OUT TO WORK]; WOLOCH, *supra* note 10, at 18-23; *see also* Alice Kessler-Harris, *Protections for Women: Trade Unions and Labor Laws*, *in* DOUBLE EXPOSURE: WOMEN'S HEALTH HAZARDS ON THE JOB AND AT HOME 139, 139-54 (Wendy Chavkin ed., 1984).

specific protective labor legislation were often muddled. Legislation frequently invoked the public health, suggesting that women did not have the right to decide the uses of their own bodies or the control of their own morals, and that women's, but not men's, rights could be subordinated to the interests of a "public." Texas, for example, affirmed its primary concern for protecting the public welfare in 1918, by forbidding the employment of women in any place that permitted "any influence, practices or conditions calculated to injuriously affect the morals" of female employees. 1918 Tex. Gen. Laws 105, *available at* http://www.lrl.state.tx.us/scanned/sessionLaws/35-4/HB_94_CH_58.pdf.

Proponents of such legislation sought to protect women workers on the assumption that women, the weaker sex, were subject to greater exploitation than men; and that women, lacking strong trade unions, had fewer resources for combating poor working conditions than men did. But proponents also supported sex-specific regulation because of worry that, left to their own devices, women workers would prioritize short-term economic self-interest rather than the best interests of family or community (a worry not expressed about male workers). KESSLER-HARRIS, OUT TO WORK, *supra* note 11, at ch. 7; WOLOCH, *supra* note 10, at 18-23; *see also United States v. Darby Lumber Co.*, 312 U.S. 100 (1941). The New York Court of Appeals sustained a 1913 state law prohibiting women from work in factories and print shops from 10 p.m. to 6 a.m., which the State defended by arguing that "ignorant women can scarcely be expected to realize the dangers not only to their own health but to that of the next generation." WOLOCH, *supra* note 10, at 94. Echoing *Muller*, the New York Court of Appeals suggested that the ban protected the future

children of female workers. Alice Kessler-Harris, *The Paradox of Motherhood: Night Work Restrictions in the United States*, *in* PROTECTING WOMEN: LABOR LEGISLATION IN EUROPE, THE UNITED STATES AND AUSTRALIA, 1880-1920, at 337 (Ulla Wikander, Alice Kessler-Harris & Jane Lewis eds., 1995); *see People v. Schweinler Press*, 214 N.Y. 395, 405, 408 (1915).

Such protective labor laws bettered conditions for some women, but also kept women out of certain employments—often higher-paying ones. The Women's Bureau of the U.S. Department of Labor supported protective laws on the grounds that they ameliorated the working conditions of millions of women, while conceding that they might handicap some groups of working women. In 1925, economist Elizabeth Faulkner Baker found that some 60,000 women had already been "cramped or cut off" from jobs they might have had. Baker concluded that "protective laws curtailed opportunity" in fields in which women were a minority and might compete with men.[12] Laws passed to protect women also were ripe for manipulation and misuse. Male trade union leaders made no secret of their hopes that protective legislation would help them to restrict women's work. The iron molders union, for example, played an important role in throwing hundreds of women out of jobs when it convinced the New York legislature to prohibit women from working

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12. Baker, *supra*, at 425-26; *see* WOLOCH, *supra* note 10, at 139; WOMEN'S BUREAU, U.S. DEP'T OF LABOR, SOME EFFECTS OF LEGISLATION LIMITING HOURS FOR WOMEN, BULL. NO. 15, at 16 (1921); WOMEN'S BUREAU, U.S. DEP'T OF LABOR, HISTORY OF LABOR LEGISLATION FOR WOMEN IN THREE STATES, BULL. NO. 66-1 (1927); *see also* EILEEN BORIS, HOME TO WORK: MOTHERHOOD AND THE POLITICS OF INDUSTRIAL HOMEWORK IN THE UNITED STATES 273-303 (1994).

in the same rooms as men and to regulate the size and weight of objects women could handle. KESSLER-HARRIS, OUT TO WORK, *supra* note 11, at 204. Legislatures created regulations that were contradictory with regard to their protective intent: New York, again, for example, prohibited women from working night hours as pharmacists in hospitals and clinics, despite the fact that those jobs were seen as safe, but did not regulate women's night work in service jobs not desired by men, including in hotels, restaurants, and cabarets, despite the evident danger to their morals in these locations. Cannery workers, generally immigrant women, were routinely exempted from night work restrictions; domestic servants, many of them African-American, and particularly vulnerable to exploitation, did not benefit from protection. VANESSA H. MAY, UNPROTECTED LABOR: HOUSEHOLD WORKERS, POLITICS, AND MIDDLE-CLASS REFORM IN NEW YORK, 1870-1940, at 3-4 (2011); *see also* KESSLER-HARRIS, OUT TO WORK, *supra* note 11, at 191-95. As late as 1944, and after millions of women had successfully worked at night, fifteen states still barred night work for women as inappropriate.

Once New Deal-era legislation allowed regulation of men's as well as women's working conditions, hours and wages, sex-specific protections for women workers should have been unnecessary. *See, e.g.*, Fair Labor Standards Act of 1938, 29 U.S.C. § 201, *et seq.*; *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act as constitutional). Yet many such laws remained, supported by stereotypical views of women's character and social roles. In 1945, for example, Michigan passed a law that prohibited women's employment as bartenders in cities with populations over 50,000, unless the women employees were the wives or daughters of male

bar owners. *See Goesaert v. Cleary*, 335 U.S. 464, 465 (1948) (upholding Section 19a of Act 133 of the 1945 Public Acts of Michigan, Mich. Stat. Ann. § 18,990(1) (Cum. Supp. 1947)). The ostensible intent of the law was to protect women from dangers in bars, as noted in this Court's decision upholding the law. Seventeen states prohibited women from bartending in 1948 and the *Goesaert* decision encouraged at least five more states to do so. Yet there were no prohibitions on women taking lower-paid jobs in the same bars as waitresses.

It became apparent during and after World War II that such "protective" legislation often disadvantaged women in the workplace and prevented them from competing with men. When the war industry wanted to draw more women workers into the labor force, states quietly circumvented sex-specific protective labor legislation: policymakers encouraged women to work overtime hours in order to contribute to the war effort and expand their incomes. RUTH MILKMAN, GENDER AT WORK: THE DYNAMICS OF JOB SEGREGATION BY SEX DURING WORLD WAR II, at 99-127 (1987). But after the war, protective laws came back into effect, with the aim of easing women out of jobs in favor of returning veterans. The strategy succeeded: trade unions colluded in enforcing sex-specific restrictions on weight lifting, night work, split shifts and other such elements, in order to push women out of higher-paying industrial jobs. Protective labor laws thus contributed to a rapid redistribution of female labor from factories to homes and then into "pink-collar" service jobs.

By and large, one major impact of the varied state statutes that claimed to protect women workers was to ensure the continued segmentation of the labor market

into (higher-paid) male and (lower-paid) female jobs. Following now outdated sensibilities about male and female roles, employed women's earnings were deemed supplementary and women and their children were expected to count on the higher wages of men in their families. Yet the U.S. Women's Bureau showed that women who worked for wages almost always did so because their families depended on what they earned, because their husbands or fathers earned low or no wages. Linda Gordon & Sara McLanahan, *Single Parenthood in 1900*, 16 J. FAM. HIST. 97, 104 (1991); *see* LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890-1935, at 30, 193-95 (1995). Far from protecting women, legislation that kept women away from higher-wage jobs forms the basis for today's continuing wage inequality.

Another justification for protective legislation was that women were too weak, and too vulnerable to damage to their reproductive capacity, to be allowed to do certain jobs. But if and when they were freed from these protections, women disproved these assumptions. They proved themselves to be capable—indeed excellent—in jobs once thought to be beyond their capacity. For example, in war industries women successfully performed "male" jobs; and women served as nurses and drivers on the front lines of military operations. Moreover, many jobs that were considered "women's work"—paid and unpaid—required women to carry quite heavy loads. They carried tired children, sick adults, typewriters, groceries, and piles of clothing. There has been no evidence in any of these situations that women's health or reproductive capacity suffered more than men's did from carrying weights or performing other strenuous work. *See generally* NANCY

MacLean, Freedom Is Not Enough: The Opening of the American Workplace, at ch. 4, 8 (2006); *see also* Jacqueline Jones, Labor of Love, Labor of Sorrow: Black Women, Work, and the Family, from Slavery to the Present 143-45, 199-210 (2d ed. 2009).

Assumptions about women's physical weakness and their necessary social roles kept sex-specific labor legislation in place until after the passage of Title VII of the Civil Rights Act of 1964, when the Equal Employment Opportunity Commission discredited such legislation as a form of discrimination. Women challenged numerous types of labor legislation initially described as protecting them, because such legislation actually hampered their choices and restricted them to lower-paid employment understood as "women's work." In 1965, for example, California aviation worker Velma Mengelkoch challenged state maximum hours limits for women workers when her employer refused her a promotion on the grounds that she could not work the hours required by the new job. *Mengelkoch v. Indus. Welfare Comm'n*, 442 F.2d 1119 (9th Cir. 1971). The maximum hours limits were imposed by section 1350 of the Labor Code of California (an eight-hour day and forty-hour week). *Id.* at 1120-21. She went first to the newly established Equal Employment Opportunity Commission, and then to federal court, where ultimately the Ninth Circuit held that Mengelkoch's challenge to the law was substantial and could be distinguished from this Court's decisions in both *Muller* and *Goesaert*.[13] Just

13. *Mengelkoch v. Indus. Welfare Comm'n*, 442 F.2d 1119, 1123-25 (9th Cir. 1971); see discussion of *Mengelkoch* in Gretchen Ritter, The Constitution as Social Design: Gender and Civic Membership in the American Constitutional Order 243-46 (2006), and Serena Mayeri, Reasoning from Race: Feminism, Law, and the Civil Rights Revolution 30-33 (2011).

a year later, Georgia telephone operator Lorena Weeks successfully challenged state weight-lifting limits (thirty pounds) that excluded her from the better-paid job of switchman. *Weeks v. S. Bell*, 408 F.2d 228 (5th Cir. 1969). In 1968, railway employee Leah Rosenfeld, unable to become a station agent, challenged California's eight-hour maximum hours law and the state weight limits rule for women in transportation. *Rosenfeld v. S. Pac. Co.*, 293 F. Supp. 1219, 1223 (C.D. Cal. 1968) (voiding paragraph 17 of California Industrial Welfare Commission Order No. 9-63).

After some deliberation, the EEOC in 1969 held sex-specific labor laws to be in violation of the equal opportunity provisions of the Civil Rights Act, unless sex was a *bona fide* occupational qualification. It left intact state provisions that required such benefits as rest periods for women. Federal courts went further, affirming employees' claims of sex discrimination and invalidating sex-specific state protective laws. *Rosenfeld*, 293 F. Supp. 1219, *aff'd*, 444 F.2d 1219 (9th Cir. 1971). A dramatic improvement in female workforce representation resulted. One knowledgeable commentator noted that "10 percent of the female work force, or four million women, were in higher occupational classifications in 1980 than would have been the case under the occupational distribution of 1965." ALFRED W. BLUMROSEN, MODERN LAW: THE LAW TRANSMISSION SYSTEM AND EQUAL EMPLOYMENT OPPORTUNITY 297-99 (1993). The change demonstrated that protective labor laws applying only to women posed a considerable impediment to women's labor force opportunities.

Laws claiming to protect women very often focused on their reproductive capacities, and in so doing, prevented pregnant women from enjoying the liberties of other citizens and workers. By 1970, thirty-five states had excluded pregnant women from collecting unemployment insurance on the grounds that they were not "employable"; almost every school district mandated that pregnant women teachers leave their classrooms by the end of their fourth or fifth month of pregnancy, and some required a mandatory leave without pay before they were allowed to return. Women, arguing that these laws did not protect the health of women and children as claimed, sued to keep their jobs, and won in this Court in 1974. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974); *see Turner v. Dep't of Emp't Sec. & Bd. of Review of Indus. Comm'n of Utah*, 423 U.S. 44 (1975); WOLOCH, *supra* note 10, at 239-42; *see also* MACLEAN, *supra*, at 129-36.

The courts then extended their skepticism of protective rationales to employment practices of private employers claiming to protect pregnant women in the workplace. In the 1970s, women challenged employment practices that kept pregnant women and those capable of becoming pregnant from a wide range of industrial jobs thought to expose them to toxic substances. Women argued that those practices did not, in fact, protect the health of women and children (or fetuses) as claimed by employers; instead, those practices discriminated against women and contravened Title VII. *See* SALLY J. KENNEY, FOR WHOSE PROTECTION? REPRODUCTIVE HAZARDS AND EXCLUSIONARY POLICIES IN THE UNITED STATES AND BRITAIN 50-51 (1992). In one example that later came before this Court, when the federal government pressured Johnson Controls (a manufacturer of batteries containing lead, a

known toxic substance) to employ women, the company retaliated by banning the employment of all fertile women. The Seventh Circuit ruled in favor of the company on the grounds that women workers should not be trusted to make their own choices, for society would later pay the price. *UAW v. Johnson Controls, Inc.*, 886 F.2d 871 (7th Cir. 1989). This Court reversed in *UAW v. Johnson Controls*, with a nod to the long history of such protective rationales, noting that "[c]oncern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities."[14] Today we know, furthermore, that it does not reflect good science to ban pregnant women, but not men of reproductive age, from jobs involving toxic exposure because men's reproductive health is similarly vulnerable to damage.

In some instances, protective laws were not truly designed to protect the health and best interests of women—if anything, they may have been tacitly designed to protect the interests of men. But, ultimately, sex-specific protective labor laws were struck down even when genuinely intended to protect women. The fate of these laws illustrates that even when protection is a genuine goal, not a pretext, and even where an apparently protective regulation in theory might serve to safeguard health, such laws may function in practice to limit women's freedom and autonomy. As such, they have been rejected as unlawful and unconstitutional because they

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14. *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 211 (1991). See discussion of *Johnson Controls* in Cynthia Daniels, At Women's Expense: State Power and the Politics of Fetal Rights 57-97 & ch. 3 (1993); *see also* Judith Scott, *Keeping Women in Their Place: Exclusionary Policies and Reproduction*, *in* Double Exposure, *supra* note 11, at 180-95.

effectively prevent women from exercising their right to self-determination in matters central to their families, livelihood, and well-being.

Today, this Court rejects gender stereotypes in laws and regards sex-based restrictions in employment to be sex discrimination. Nevertheless, the legacies of such laws, and the long shadow of coverture, though generally repudiated, have not been completely eradicated. Distrust of women's autonomy, and lingering beliefs in women's need for protection from situations they are assumed to be unable to negotiate, may still on occasion find expression in law. This Court has recognized this, in *Casey*, using the "undue burden" framework to assess whether state restrictions on abortion "impose a substantial obstacle to a woman's choice" to exercise a constitutionally protected right. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 901 (1992).

III. IN LIGHT OF THIS HISTORY, WHEN A LAW CLAIMS TO PROTECT WOMEN BY REGULATING ABORTION CLINICS, THE COURTS SHOULD CAREFULLY EXAMINE WHETHER THE LAW ACTUALLY PROMOTES WOMEN'S HEALTH, AND AT WHAT POSSIBLE COST TO WOMEN'S LIBERTY.

This Court observed several decades ago that "the position of women in America has improved markedly in recent decades." *Frontiero v. Richardson*, 411 U.S. 677, 685 (1975). Nevertheless, women still face obstacles that are at times "more subtle." *Id.* at 686. Laws claiming to protect women may be some of these "more subtle" threats to women's dignity and equality, and thus warrant very careful scrutiny from this Court.

The history recounted here suggests that protective rationales may obscure the real effects of laws that ostensibly regulate women's health and safety. In *Casey*, this Court recognized that while "the State may enact regulations to further the health or safety of a woman seeking an abortion," the State may not enact "[u]nnecessary health regulations." *Casey*, 505 U.S. at 878. *Casey* instructs courts to review carefully regulations that invoke protection of women's health to ensure that the laws, in practice, truly do serve health-related purposes. Moreover, *Casey* forbids even a law designed to protect women's health or to preserve potential life from imposing an undue burden on women's freedom and dignity. States may enact only regulations that are "calculated to inform the woman's free choice, not hinder it." *Id.* at 925.

Texas regulations on abortion clinics, whether or not they are genuinely intended to protect women's health, should be carefully examined for the actual burdens they place on women, for here "the liberty of the woman is at stake in a sense unique to the human condition." *Id.* at 852.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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